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No. 85-1423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PRIVATE TRUCK COUNCIL OF AMERICA, INC., *et al.*,
Petitioners

v.

RODNEY S. QUINN, *et al.*

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondents oppose the petition for a writ of certiorari principally on three grounds. First, they contend that petitioners' claim under 42 U.S.C. §1983 for refunds of unconstitutional taxes paid is foreclosed by prior decisions of this Court assertedly holding states immune from such claims under the Eleventh Amendment (Br. in Opp. at 4). Second, respondents claim that there is no "genuine" conflict among the circuits over the application of Section 1983 to Commerce Clause violations because the decision of the United States Court of Appeals for the Third Circuit on this issue was, respondents assert, only dictum (Br.

in Opp. at 5). Third, they claim that when this Court in *Atchison T. & S. F. Ry. v. O'Connor*, 223 U.S. 280 (1912) held that sanctions for non-payment of a tax may imply its payment under duress for purposes of a constitutional entitlement to a refund, it was merely making common law, which each state is free to disregard.[1]

As we discuss below, each of these contentions is incorrect. Contrary to respondents' assertions, the issues presented by the petition, which concern the application of 42 U.S.C. §1983 to Commerce Clause violations and the scope of constitutional remedies for unconstitutional taxes, are important and recurring and involve a direct conflict among the circuits. This Court's review is clearly warranted.

I. States Have No Immunity From A Monetary Claim Under Section 1983 Brought In State Court

Respondents erroneously contend that petitioners' claim under 42 U.S.C. §1983 for the refund of taxes paid prior to filing suit is foreclosed by decisions of this Court assertedly holding that states have sovereign immunity from such claims, citing *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Quern v. Jordan*, 440 U.S. 332 (1979). Accordingly, respondents claim, only attorneys' fees under 42 U.S.C. §1988 turn on the §1983 question presented by petitioners.

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[1] It is noteworthy that respondents have not cross-petitioned for a writ of certiorari to review that portion of the Maine court's opinion holding the challenged retaliatory taxes unconstitutional under the Commerce Clause. Thus, respondents do not in this Court dispute the determination that those taxes are unconstitutional, but simply seek to retain the fruits of the State's unconstitutional exaction.

Respondents are incorrect. In *Edelman v. Jordan, supra*, and *Quern v. Jordan, supra*, this Court only held that the Eleventh Amendment bars claims against a state for monetary relief under §1983 that are brought in federal court. The Court has never held that states have sovereign immunity from such claims brought, as this one was, in state courts. On the contrary, as Justice Marshall explained in his concurring opinion in *Employees v. Missouri Public Health Department*, 411 U.S. 279, 288 (1973) (Marshall, J., joined by Stewart, J., concurring):

> The common law doctrine of sovereign immunity . . . was modified *pro tanto* in 1788 to the extent that the States relinquished their sovereignty to the Federal Government. At the time our Union was formed, the States, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to Congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress.

This Court recently confirmed that principle in *Atascadero State Hospital v. Scanlon*, ___U.S. ___, 105 S. Ct. 3142, 3147, n. 2 (1985), when it explained that the Eleventh Amendment issue presented in *Edelman* and other cases did not concern the "general immunity of the States from private suit. . . but merely the susceptibility of the States to suit before *federal tribunals*." (Emphasis in original.) After quoting with approval the views expressed by Justice Marshall in the *Employees* case, the Court stated: "It denigrates

the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Ibid.* This statement clearly indicates that states have no immunity from suits for monetary redress brought in state courts under §1983 or other federal laws, and that state courts are obliged by our federal system to enforce those federal rights.[2]

In sum, the issue presented—whether or not §1983 applies to Commerce Clause violations—is important principally to establish the entitlement of petitioners and the class they represent to refunds of taxes paid prior to filing suit. It is also significant, however, for purposes of recovering attorneys' fees under 42 U.S.C. §1988, which is an important aspect of the remedies fashioned by Congress for deprivations of federal rights under color of state law. As this Court noted in *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980): "Congress viewed the fees authorized by §1988 as 'an integral part of the remedies necessary to obtain compliance with §1983.' S. Rep. No. 94-1011, p. 5 (1976)."

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[2] In *Thiboutot v. State*, 405 A. 2d 230, 237 (Me. 1979), affirmed sub nom. *Maine v. Thiboutot*, 448 U.S. 1 (1980), also cited by respondents, the Supreme Judicial Court of Maine stated that sovereign immunity would bar a class claim for improperly withheld social security payments brought in state court under §1983. That conclusion was in error for the reasons stated in the text. Furthermore, that issue was not presented to or ruled on by this Court, which merely affirmed the Maine Court's holding that §1983 provides relief for Social Security Act violations and which actually ordered the State to pay the individual claimants amounts that had been withheld.

II. The Circuits Are in Direct Conflict Over The Application Of 42 U.S.C. §1983 To Commerce Clause Violations

Respondents are also incorrect in contending that there is no "genuine" conflict among the circuits with respect to the issue of the application of Section 1983 to Commerce Clause violations because the Third Circuit's holding in *Kennecott Corp. v. Smith*, 637 F. 2d 181 (3d Cir. 1980) that Section 1983 does apply to such violations was assertedly only dictum and was not discussed at length. The Third Circuit's holding was not dictum; it was the principal basis for the Court's holding, which was disputed by defendants, that the Anti-Injunction Act, 28 U.S.C. §2283, did not bar an injunction against a state proceeding that would allegedly violate the plaintiff's rights under the Commerce Clause. See 637 F. 2d at 186. The fact that the court also noted a second, alternative basis for that conclusion does not make its first and principal holding dictum. Even the court below recognized the decisions of the Third Circuit in *Kennecott Corp. v. Smith, supra*, and of the United States District Court in *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1975), aff'd, 425 U.S. 463 (1976) as "holdings going the other way." (Pet. App. 12a).

Nor is there any basis for respondents' suggestion that the Third Circuit's conclusion was not fully considered. It cited and correctly relied on this Court's decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980), which, as noted in the Petition at p. 12, confirmed that §1983 encompasses violations of all federal con-

stitutional and statutory rights.[3] In this regard, moreover, respondents have not even addressed petitioners' showing (Pet. at 12-13) that the holding of the court below respecting Section 1983 conflicts squarely with this Court's decisions in *Maine v. Thiboutot*, supra; *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 725 (1977) and other cases.[4]

Furthermore, contrary to respondents' contention, whether Section 1983 applies to Commerce Clause violations is a recurring issue of the greatest importance. As noted by respondents themselves, the Tenth Circuit has recently joined the Eighth Circuit on this issue in conflict with the Third Circuit, and the issue is likely to recur in numerous cases challenging state actions as violative of the Commerce Clause. See *J. & J. Anderson, Inc. v. Town of Erie*, 767 F. 2d 1469, 1476-1477 (10th Cir. 1985).

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[3] The fact that the Third Circuit, like the United States District Court for the District of Montana in the *Confederated Salish and Kootenai Tribes* case, did not elaborate at length on this conclusion does not indicate that the issue was not fully considered; more likely, it simply reflects the fact that the conclusion is clearly required by the language of Section 1983 and this Court's decisions.

[4] Respondents also advance the astounding argument that Section 1983 should not be construed to apply to Commerce Clause violations because the courts had recognized the right of private litigants to seek judicial protection for such violations before 1871, when Section 1983 was enacted (Br. in Opp. at 7, n. 6). The courts had also recognized similar rights in respect of many other constitutional provisions, and respondents' argument, if accepted, would carve a very large exception from the protections provided by Sections 1983 and 1988, an exception which finds no support in this Court's cases.

III. The States May Not Disregard This Court's Decision In *Atchison T. & S. F. Ry v. O'Connor*, 223 U.S. 280 (1912)

Respondents acknowledge that this Court's decisions establish that the Constitution itself requires the return of taxes exacted under compulsion, but they insist that the criminal sanctions imposed by the State (up to six months in prison, $5,000 in fines and the loss of the privilege to operate vehicles in the State) did not sufficiently compel the tax payments for purposes of petitioners' constitutional entitlement to refunds. (Br. in Opp. at 7-9). They further acknowledge that these sanctions would constitute implied duress under this Court's decision in *Atchison T. & S. F. Ry v. O'Connor, supra*, but insist that this Court was merely fashioning general common law which state courts since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) are free to disregard.

Respondents' argument is untenable. Justice Holmes was not merely fashioning general common law in the *Atchison* case; by determining the circumstances in which persons are entitled under the Constitution to the return of monies exacted by an unconstitutional state tax, he was clearly delineating the scope of the constitutional right itself and was thus articulating important federal constitutional principles.[5] In any event, whether the scope of citizens' constitutional remedies under *Carpenter v. Shaw*, 280 U.S. 363 (1930), *Ward v. Love County*, 253 U.S. 17 (1920) and other cases turn on the vagaries of each state's common law, as

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[5] That this is so is reflected in the fact that this and other courts have cited and followed the *Atchison* principle in cases decided after *Erie*. *See, e.g., Altvater v. Freeman*, 319 U.S. 359, 365 (1943).

respondents contend, is itself an exceedingly important issue warranting this Court's review.

CONCLUSION

This Court should grant the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Maine in this case.

Respectfully submitted,

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